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IN THE

Supreme Court of the United States

October Term, 1963

No. 110

WILLIAM MALLOY,

Petitioner,

v.

PATRICK J. HOGAN,
Sheriff of Hartford County,

Respondent.

On Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union is a private nonpartisan organization engaged solely in the defense of the Bill of Rights. Our interest in the case at bar revolves around the due process of law, specifically, the Fifth Amendment privilege against self-incrimination and its application to the states through the Fourteenth Amendment.

We believe that the privilege should be held applicable to the states as part of the "fundamental law" of our nation. Due process requires nothing less than that *Twining* v. *New Jersey*, 211 U. S. 78 (1908) be overruled.[a]

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[a] This brief is filed with consent of the parties on file in the Office of the Clerk.

Statement of Facts

In September 1959, petitioner was found guilty of pool selling, fined one hundred dollars and given a one-year jail term which was ordered suspended after ninety days. Petitioner was placed on probation for two years (R. 6, 17, 27).

In January 1961, petitioner was subpoenaed to testify before a referee appointed by the Hartford County Superior Court to investigate gambling (R. 7, 17, 27). Petitioner answered some questions but refused to answer others on grounds of self-incrimination (R. 7-10, 17-20, 27, 28). He was held in contempt. On appeal, the Connecticut Supreme Court of Errors affirmed the lower court's findings that the Fifth Amendment privilege does not apply to state proceedings and that the assertion of incrimination is insufficient, but that a court, before allowing the privilege, must reasonably conclude from all the facts that criminal liability would follow (R. 35).

ARGUMENT

I

The Fifth Amendment privilege against self-incrimination is part of the due process embraced by the Fourteenth Amendment.

A. A proper reading of history reveals that the privilege against self-incrimination was regarded as a fundamental right at the time the Constitution was adopted.

When the barons wrested Magna Carta from King John at Runnymede in 1215, they won the guarantee that "No freeman shall be taken and imprisoned * * * nor will we go upon him or send upon him, except by the lawful judgment of his peers and by the law of the land." "By the law of the land"—*per legem terrae*—has been adopted in our own Constitution as "due process of law." The

Supreme Court of Errors of Connecticut has acknowledged that to deprive a man of fundamental privileges guaranteed by the law of the land is to deprive him of "due process of law" (R. 35). Hence an inquiry is necessary whether the privilege against self-incrimination is part of our fundamental law.

A majority of the Court in *Twining* v. *New Jersey*, 211 U. S. 78 (1908), concluded that the privilege was not so established when our Constitution was adopted. Mr. Justice Harlan, in dissent, read history quite differently. He found that the right not to be compelled to be a witness against oneself was a right long at the center of the Englishman's concern, hard won after centuries of struggle, and a right especially prized by settlers who fled to this country.

It is true, of course, that the privilege against self-incrimination was not always established, just as the concept of "the king in Parliament" was not always established. Both notions of government had to be fought for, and this, indeed, demands all the more that they should not be lightly disregarded. The inquisitorial procedures of the ecclesiastical courts, with the rack and the screw, whose slightest suggestion in this country "shocks the conscience",[1] long disturbed both the bodies and the brows of Englishmen. But by the sixteenth century dissatisfaction with such procedures grew so great as to take the shape of the maxim, "Nemo tenetur prodere se ipsum"—no one should be required to accuse himself. The future Lord Chief Justice Coke won relief against the inquisitorial proceedings of the ecclesiastical courts, *Cullier and Cullier*, Cro. Eliz. 201 (1589).[2]

On the secular side we find compulsion to give evidence against one self continuing into the seventeenth century, when, in 1637, the famous Leveller, "Freeborn John" Lil-

[1] *Rochin* v. *California*, 342 U. S. 165 (1952).

[2] See, Griswold, "The Fifth Amendment Today," p. 2 (Cambridge, 1955).

burne, was ordered tortured by the Star Chamber for his refusal "to take a legal oath" and "answer truly" against himself.[3] But in 1641, Parliament reversed this judgment and decreed that Lilburne's punishment was "illegal" and against the "liberty of the subject."

Abolition of the notion that a man might be compelled to produce evidence against himself did not take hold immediately upon Lilburne's courageous stand against the Star Chamber. In commenting on the adoption of Magna Carta's "per legem terrae" into the Fifth Amendment's provision that "No person shall . . . be deprived of life, liberty or property without due process of law", Dean Griswold quotes the words of Dr. Mott:[4]

> "This portion of the Fifth Amendment may thus be regarded as containing phraseology of purest gold mined under the stress of heated constitutional crises, refined by the fire of violent revolutions, proved by the acid test of centuries of struggle and molded by the hand of one of America's greatest constitutional draftsmen (Madison)."

The majority of the Court in *Twining*, in ruling that the privilege was not firmly established either in England or this country at the time of The Mayflower, seems to make much of the fact that Governor Winthrop of Massachusetts, in the trial of Anne Hutchinson as a witch in 1627, was "not aware of any privilege against self-incrimination or conscious of any duty to respect it," 211 U. S. at 103-104. But as Justice Black, dissenting in *Adamson* v. *California*, 332 U. S. 46 (1947), points out, the narrowly orthodox are seldom convinced that the unorthodox have any rights:

> "The lamentable experience of Mrs. Hutchinson and others, contributed to the overwhelming sentiment that demanded adoption of a constitutional Bill

[3] *Id.* p. 3.

[4] *Id.* pp. 35-36, quoting Mott, R. L., "Due Process of Law," (Indianapolis, 1926).

> of Rights. The founders of this government wanted no more such 'trials' and punishments as Mrs. Hutchinson had to undergo. They wanted to erect barriers that would bar legislators from passing laws that encroached on the domain of belief, and that would, among other things, strip courts and all public officers of a power to compel people to testify against themselves. See Pittman, at 789".[5]

Indeed, Massachusetts, in its Constitution of 1780, was one of the first states to provide that "no subject shall be * * * compelled to give evidence against himself, in a court of criminal law." Suffice it to say that by the time the Federal Constitution was adopted in this country, the rights of both the English and American people were on a far different footing than in the days of the Star Chamber and the witchcraft trial of Anne Hutchinson.

The majority in *Twining* was also disturbed by the fact that when the states (except for New Jersey and Iowa) drew up their own constitutions, the privilege against self-incrimination was set forth separately from and in addition to the "due process" clause. The *Twining* Court drew the inference that such separate enumeration meant that the privilege against self-incrimination was not thereby "fundamental in due process of law, nor an essential part of it."[6] But exactly the opposite inference may be drawn, namely, that the states considered the privilege against self-incrimination so essential that they spelled it out in their constitutions. As the first Mr. Justice Harlan noted in his dissent in *Twining*:

> "If at the beginning of the Revolutionary War any lawyer had claimed that one accused of crime could lawfully be compelled to testify against himself, he would have been laughed at by his brethren

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[5] 332 U. S. at 88-89. The reference is to Pittman, "The Colonial and Constitutional History of the Privilege against Self-Incrimination," 21 Va. L. Rev. 763 (1935).

[6] 211 U. S. at 119.

> of the bar, both in England and America. In accordance with this universal view as to the rights of freemen, Virginia, in its convention of May, 1776—in advance, be it observed, of the Declaration of Independence—made a Declaration * * * which set forth certain rights as pertaining to the people of that State * * * 'as the basis and foundation of government.' Among those rights (that famous Declaration distinctly announced) was the right of a person not to be compelled to give evidence against himself." 211 U. S. at 119-120.

B. Even if an analysis of history leads the Court to conclude that the privilege against self-incrimination was not a fundamental right at the time the Federal Constitution was adopted, it is clear that the framers of the Fourteenth Amendment intended that Amendment to make the Bill of Rights binding on the states.

Amicus' reading of history concurs with Mr. Justice Harlan in his *Twining* dissent and Dean Griswold in "The Fifth Amendment Today". We believe with them that, at the time the Federal Constitution was adopted, the notion that a man should not be compelled to incriminate himself was firmly embraced by the concept of "due process of law". In this connection we have seen that constitutional history can be subject to two quite different readings. But even if the reading of history in the majority opinion in *Twining* is affirmed by this Court, it is at least clear that at the time of the adoption of the Fourteenth Amendment in 1866, the framers of that Amendment intended the privilege against self-incrimination, as found in the Bill of Rights, to apply against the states. A most illuminating discussion of the intent of the framers of the Fourteenth Amendment is to be found in the Appendix to Justice Black's dissent in *Adamson*, 332 U. S. at 92.

Congressman Bingham, the member of the Reconstruction Committee who presented the Amendment to the House of Representatives, was under the impression (as was the

majority later in *Twining*) that the privilege against self-incrimination and the Bill of Rights were not binding on the states. In fact, he believed that such a state of affairs had been a major source of the difficulties between the states:

> "Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every state, by congressional enactment, to enforce obedience to these requirements of the Constitution [i.e., the Fifth Amendment]. Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every state, that rebellion, which has scarred and blasted the land, would have been an impossibility."[7]

Some members of Congress took issue with Congressman Bingham. They said that the Bill of Rights was already binding on the states.[8] Nonetheless, Congressman Bingham was insistent that the Supreme Court's decision in *Barron* v. *Baltimore*, 7 Peters 243 (1833), had made it evident that the Federal government could not enforce the provisions of the Fifth Amendment against the states. It should be carefully noted in this connection that *Twining* rested in large measure upon the earlier authority of *Barron* v. *Baltimore*.

Congressman Bingham insisted that the result of the *Barron* case be overturned:

> "The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of the states for violation of the oaths enjoined upon them by the Constitution * * * Is the Bill of Rights to stand in our Constitution hereafter, as in the past five years within eleven states, a mere dead

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[7] Cong. *Globe*, 39th Cong., 1st Sess, 1033-34 (1865).

[8] *Id.* at 1059, 1066, 1088.

> letter? It is absolutely essential to the safety of the people that it should be enforced.''[9]

Justice Black tells us that Kendrick, an important writer on the adoption of the Fourteenth Amendment, observed that '' 'Bingham's speech in defense and advocacy of his amendment comprehends practically everything that was said in the press or on the floor of the House in favor of the resolution' ''.[10]

In placing the proposed amendment before the Senate, on May 23, 1865, Senator Howard spoke as follows:

> ''I * * * present to the Senate * * * the views and the motives [of the Reconstruction Committee] * * * The first section of the amendment * * * relates to the privileges and immunities of citizens of the several states, and to the rights and privileges of all persons, whether citizens or others, under the laws of the United States * * * [Senator Howard discussed the character of the privileges and immunities spoken of in the second section of the fourth article of the Constitution]. *To these privileges and immunities * * * should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution * * * The great object of the first section of this (the Fourteenth Amendment) is, therefore, to restrain the power of the States and compel them at all times to respect these fundamental guarantees.*''[11]

C. In addition to the historical evidence presented above, the decisions of this Court indicate that the Fifth Amendment guarantee of the privilege against self-incrimination should apply to the states.

In his dissenting opinion in *Adamson*, Mr. Justice Black points out a long line of dissenting opinions of this Court

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[9] *Op. cit.*, at 1089-91.

[10] 332 U. S. at 98, quoting Kendrick, "Journal of the Joint Committee on Reconstruction," 217 (1914).

[11] Cong. *Globe*, *supra* at 2765. (Emphasis added.)

which argued that the Bill of Rights should be deemed to apply to the states through the Fourteenth Amendment. He suspects the reasoning of the *Twining* majority; he believes it can be read, not only as giving leeway to the states to disregard the provisions of the Bill of Rights, but also as potentially allowing this Court to place great restraints upon state power. He fears giving this Court the power to determine from time to time what should be the "fundamental rights" which are to be protected against state infringement by the "due process" clause of the Fourteenth Amendment. At one time, as is the case in *Twining*, far less than the enumerated protections of the Bill of Rights may be thought granted to the citizens of the several states; at another time far more than these minimum protections may be deemed necessary to protect individual citizens against state action. It is Justice Black's purpose to stabilize the law—to make the guarantees of the Bill of Rights inviolate against state infringement on the one hand, and, conversely, prevent the courts from going too far the other way.

Whether for good or ill, the fact remains that this Court's approach towards what should be the content of the Fourteenth Amendment has not been stable. In a separate dissent in *Adamson*, Mr. Justice Murphy voiced the opinion that while the guarantees of the Bill of Rights against state action should be regarded as a minimum, a floor below which the states cannot go in determining what fundamental liberties are protected by "due process":

> "Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights." [12]

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[12] 332 U. S. at 124. Some parts of the Fifth Amendment have already been held to apply to the states. Property cannot be taken without just compensation. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897).

In the main, this Court's approach to the problem of which rights are deemed so fundamental that any abridgement would, *ipso facto*, be a denial of "due process" has taken the form of selective supplementation from the Bill of Rights. Mr. Justice Moody, speaking for the Court in *Twining*, looked at the matter thus:

> "It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. 'That * * * would be to deny every quality of the law but its age, and to render it incapable of progress or improvement.' *Holden* v. *Hardy*, 169 U. S. 366, 388 * * * " 211 U. S. at 101.

Mr. Justice Frankfurter took a similar view:

> "Here we are concerned with the requirement of 'due process of law' in the enforcement of a state's criminal law. Experience has confirmed the wisdom of our predecessors in refusing to give a rigid scope to this phrase. It expressed a demand for civilized standards of law. It is not thus a stagnant formulation of what has been achieved in the past, but a standard for judgment in the progressive evolution of a free society." *Malinski* v. *New York*, 324 U. S. 401, 414 (1944).

Indeed, it is clear from recent decisions of this Court, that the flexible approach to "due process of law" has led to improvement and more "civilized standards" of law. This is especially so in the area under consideration in the instant case. If any evolution can be recognized, it can most certainly be noted in the disposition of the Court to find the guarantees of the Bill of Rights binding upon the states. Provisions of the Bill of Rights which were not formerly deemed basic to the concept of "ordered liberty" are now

considered "fundamental rights" within the protection of the due process clause of the Fourteenth Amendment.

One of these notable decisions is *Mapp* v. *Ohio*, 367 U. S. 643 (1960). *Mapp* held that evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court, thus overruling *Wolf* v. *Colorado*, 338 U. S. 25 (1948). Just as *Mapp* made the Fourth Amendment guarantees against unreasonable searches and seizures applicable to the states, so did *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), make the Sixth Amendment guarantee of the right to counsel applicable to the States. In that case also, a former decision of this Court, *Betts* v. *Brady*, 316 U. S. 455 (1942), which did not recognize the right to counsel as a "fundamental right", was overruled. In his concurring opinion in *Gideon*, Mr. Justice Douglas said:

> "While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten justices have felt that it protects from infringement by the states the priviliges, protections, and safeguards granted by the Bill of Rights.
>
> "Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in *O'Neil* v. *Vermont*, 144 U. S. 323, 362-363, 370-371, as did Justices Black, Douglas, Murphy and Rutledge in *Adamson* v. *California*, 332 U. S. 46, 71-72, 124. * * * That view was also expressed by Justices Bradley and Swayne in the *Slaughter-House Cases*, 16 Wall. 36, 118-119, 122 * * *.
>
> "[the view that a guarantee of the Bill of Rights made applicable to the states by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal government] has not prevailed and rights protected against state invasion by the Due Process clause of the Fourteenth

Amendment are not watered-down versions of what the Bill of Rights guarantees." 372 U. S. at 345-6.

It is significant that *Mapp* made much of the close interrelationship between the Fourth and Fifth Amendments. Mr. Justice Black said:

> "I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar [the incriminating evidence] * * * Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.
>
> "The close interrelationship between the Fourth and Fifth Amendments, as they apply to this problem, has long been recognized and, indeed, was expressly made the ground for this Court's holding in *Boyd* v. *United States*. There the Court fully discussed this relationship and declared itself 'unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself'. It was upon this ground that Mr. Justice Rutledge largely relied in his dissenting opinion in the *Wolf* case * * * its force has for me at least, become compelling with the more thorough understanding of the problem brought on by recent cases. In the final analysis, it seems to me that the *Boyd* doctrine * * * is amply justified from an historical standpoint, soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the *Boyd* case:
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> "'[C]*onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half of their efficacy*, and leads to gradual deprecia-

> tion of the rights, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" 367 U. S. at 661-63 (emphasis added).

In "The Fifth Amendment Today," Dean Griswold says that the privilege against self-incrimination is "one of the great landmarks in man's struggle to make himself civilized".[13] We have noted earlier that one of the chief reasons (according to Mr. Justice Frankfurter) for keeping the concept of "due process" flexible was the demand for "civilized standards of law".[14] As our civilization advances, our respect for the necessity of procedural safeguards increases.

Boyd and *Mapp* set forth the close link between the Fourth and Fifth Amendments. The essence of that link is a respect for the right of privacy of the individual.

As this Court said in *Boyd*, when it announced that the Fourth and Fifth Amendments run "almost into each other," the doctrines of those Amendments

> "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty and private property * * *. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers be used as evidence to convict him of crime * * * is within the condemnation * * * [of those Amendments]." 116 U. S. at 630.

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[13] Griswold, "The Fifth Amendment Today," p. 7.

[14] *Malinski* v. *New York*, 324 U. S. 401, 414.

The rationale of *Mapp* was that "a man's home is his castle." To be sure, if the police were allowed to conduct unreasonable searches and seizures, much relevant and highly reliable evidence might be turned up against many of our citizens. Likewise the objection to coerced confessions is not due primarily to their lack of reliability. Rather, by holding the fruits of unreasonable searches and seizures and confessions coerced by state officers inadmissible, this Court has intended to achieve the independent objective of insuring more civilized procedures in law enforcement. For proper procedures are of the essence. As Justice Frankfurter has said, "The history of liberty has largely been the history of observance of procedural safeguards".[15]

The ends of criminal justice cannot be separated from the means used to achieve those ends. Formerly men were tortured in order to compel them to confess. One wonders, however, whether there is an essential difference if the punishment comes afterwards, rather than before, in the form of a jail term for contempt. And if a man's home, being his castle, is deemed inviolate, than *a fortiori* the man himself should be immune from an unreasonable search, on pain of going to jail for refusal to answer incriminatory questions.

To be sure, to be deprived of any means by which a conviction can be obtained makes the job of law enforcement officers more difficult. But, as Judge Magruder states in *Muffie* v. *United States*, 209 F. 2d 225 (C. A. 1, 1954), our founding fathers judged that the loss of a short cut to conviction was better for this country than a deprivation of fundamental civil liberties.

> "They made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecu-

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[15] *McNabb* v. *United States*, 318 U. S. at 347 (1943).

> tion should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." 209 F. 2d at 227.

It has never been part of American jurisprudence that convictions should be easy. The fundamental tenet of our law is that a man is presumed innocent until proven guilty. The privilege against self-incrimination is another way of stating this principle.

To compel the states to convict an accused only after its law enforcement officers have produced evidence apart from the testimony of the accused may make the path to truth more cragged, but in the process, the last vestige of the inquisitorial system of "justice" will have been laid aside.

D. If the present difference between the Federal Government and the States in applying the Fifth Amendment is allowed to persist, the vitality of the Fifth Amendment will be seriously undermined: the problem of *Feldman* v. *United States*.

One of the milestones on the path to *Mapp* was the elimination of the "silver platter" doctrine, which allowed the use in federal courts of evidence seized by state agents in violation of constitutional guarantees.[16] The evil of the doctrine was that federal and state officers frequently collaborated. The result for the defendant was the same as if the federal officers had conducted the illegal search and seizure in the first place, thus making the Fourth Amendment a "dead letter".

As the law now stands, a similar evil exists because of the federal-state dichotomy in the area of the privilege against self-incrimination. *Feldman* v. *United States*, 322 U. S. 471 (1943), held that the Fifth Amendment does not forbid the use in a federal court of self-incriminating testimony compelled in a state court. This Court has also held,

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[16] *Elkins* v. *United States*, 364 U. S. 206 (1960).

in *Mills* v. *Louisiana*, 360 U. S. 230 (1958), that even when there is evidence of active collaboration between federal and state officials, the state can still compel the testimony. Even though testimony thus compelled may not be admissible in a subsequent federal prosecution,[17] this result gives the defendant only partial protection.

> "To compel testimony in a federal investigation, a witness must be assured at the outset complete immunity from any *prosecution* which might result from his compelled disclosures." [18]

Moreover, collaboration between federal and state officials can be so quietly and subtly done as to remain undetected, and an unconstitutional federal conviction might thus easily result.

There is no evidence in the record of this case of a contemplated federal prosecution. What is at issue is whether the Fifth Amendment, contrary to the holding of the Connecticut Court, should be made applicable to the states. We submit that if the Fifth Amendment were so applied, the difficulties posed for federal courts by the *Feldman* and *Mills* decisions would disappear. There would be no danger that, by federal-state collaboration, detectable or not, the vitality of the Fifth Amendment protection would be sapped.

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[17] See *Byars* v. *United States*, 273 U. S. 28 (1926).

[18] Mr. Chief Justice Warren, dissenting in *Mills* v. *Louisiana*, *supra* at 235.

II

Assuming that the Fifth Amendment is binding on the states through the Fourteenth Amendment, the test as to whether the questions asked might tend to incriminate petitioner must be fundamentally the same for the States as for the Federal Government. The States cannot determine that these questions tended to incriminate petitioner by use of improper constitutional standards.

When *Mapp* v. *Ohio* established that the Fourth Amendment's prohibition against "unreasonable searches and seizures" was binding on the states, there was no need to spell out the standards by which "unreasonableness" was to be determined. The search of Miss Mapp's home was clearly unreasonable. A much closer case of "unreasonableness" was before the Court in the closing days of this past term. In that case, *Ker* v. *California*, 374 U. S. 23 (1963), the Court articulated for the first time the standards by which a state court's determination of reasonableness would be reviewed. The Court had three alternative tests:

1. A minimal Fourteenth Amendment due process test.

2. The federal test of "reasonableness", used by this Court in reviewing the judgments of federal courts.

3. A "state" test—hewing closely to the federal test, but somewhat less stringent due to absence of supervisory authority over state courts.

These tests are, of course, directly in point here because, due to the close relationship between the Fourth and Fifth Amendments, the same scope of review should be adopted here as was adopted in *Ker*.

In *Ker*, eight justices agreed that the third of the above tests should be adopted.[19] Recognizing that federalism

[19] The lone dissenter from this standard was Mr. Justice Harlan.

was by no means dead, the Court repeated its definition of "modern day" federalism:

> "'[A] healthy federalism depends upon the avoidance of needless conflicts between state and federal courts' by itself urging that '[f]ederal state-cooperation in the solution of crime under constitutional standards will be promoted, if only * * * [they] respect the same fundamental criteria in their approaches' ". 374 U. S. at 31.

Yet the Court in *Ker* indicated that the grey area was quite narrow between a state court's application of the same "fundamental criteria" as the Supreme Court and the stricter application of the Fourth Amendment expected of a federal court. In the first place the Court said the Fourth Amendment should be "liberally construed".[20] This caveat has likewise been applied by many decisions of this Court to the construction of the Fifth Amendment since the latter relates, like the Fourth, to the right of privacy of the individual.[21] Secondly, the Court noted that:

> "[F]indings of state courts are by no means insulated against examination here * * * While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings and the record so that it can determine for itself whether in the decisions as to reasonableness the fundamental—i.e. constitutional—criteria established by this Court have been respected." 374 U. S. at 34.

Amicus submits that this broad scope of review must be applied in the instant case.

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[20] See 374 U. S. at 33.

[21] See especially *Hoffman* v. *U. S.*, 341 U. S. 479 (1951).

III

In light of the fundamental constitutional standards laid down by this Court and lower federal courts, the courts below erred in concluding that to compel petitioner to answer the questions asked him would not violate his rights under the Fifth Amendment.

A. The content of the Constitutional standard, giving every possible benefit of the doubt to the accused: *Hoffman* v. *United States* and its progeny.

The leading recent case discussing the Fifth Amendment privilege against self-incrimination is *Hoffman* v. *United States*, 341 U. S. 479 (1951). Hoffman, like petitioner, had a police record and was called to testify at a special crime investigation. He was asked about his occupation and his contacts with a fugitive witness. A judge who had empaneled the grand jury and who was familiar with the context in which the questions were asked found no "real and substantial" danger in these questions and sentenced Hoffman for contempt when he refused to answer them. In reversing Hoffman's conviction this Court did the following:

1. Noted a signal increase in the number of cases in which the privilege against self-incrimination had been unsuccessfully invoked, and said that courts must be "alert to repress any abuses of the investigatory power." 341 U. S. at 485.

2. Said that the Fifth Amendment must be liberally construed.

3. Cautioned that too high a price might be paid for the unhampered enforcement of the criminal law and that other social objects of a free society should not be sacrificed.

4. Furnished a definition of the privilege against self-incrimination which is designed to give the witness every possible benefit of the doubt:

> "The privilege afforded not only extends to answers that would in themselves support a conviction * * * but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute * * * If the witness, upon interposing his claim, were required to prove the hazard * * * he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." 341 U. S. at 486-87.

5. Said that after using such a test, the trial judge must be "'*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." 341 U. S. at 488.

Soon after *Hoffman*, two cases involving the privilege came before the United States Court of Appeals for the Third Circuit. With the *Hoffman* decision as a guide, the Third Circuit decided that the answers to the questions in the setting in which they were asked would not incriminate two defendants. Both decisions were reversed *per curiam*, by this Court. *Greenberg* v. *United States*, 343 U. S. 918 (1952); *Singleton* v. *United States*, 343 U. S. 944 (1952).

Particularly noteworthy is the *Singleton* reversal.[22] Like petitioner, Singleton was in the "numbers racket" and had a police record. Singleton was asked what business three individuals were in. The trial record gave no indication that these individuals were notorious. Singleton made

[22] For a statement of the case see 193 F. 2d 464 (1952).

no attempt "to alter the picture, by indicating, even generally, the character or reputation of these individuals." 193 F. 2d at 467. Furthermore, a Special Assistant to the Attorney General testified that he did not know of any business connection between the three individuals and Singleton, and had no reason to believe that answers to the questions put to Singleton would incriminate him in a federal offense. Nonetheless Singleton's contempt sentences for refusal to answer was summarily reversed by this Court. Consistency demands a similar reversal in his case.

In *United States* v. *Coffey*,[23] which followed shortly after *Greenberg* and *Singleton*, the Third Circuit concluded, in the light of those recent decisions, that

> "in determining whether the witness really apprehends danger in answering a question, the judge cannot permit himself to be skeptical; rather must he be acutely aware that in the deviousness of crime and its detection, incrimination may be approached by obscure and unlikely lines of inquiry." 198 F. 2d at 440-441.

B. Neither the trial court nor the Supreme Court of Errors of Connecticut applied correct Constitutional standards in determining whether the questions asked petitioner would tend to incriminate him.

It is clear that this Court will give a witness every possible benefit of the doubt before upholding a sentence for contempt. We have also seen that there is a little, though not much, play in the joints of federalism for a state court to depart slightly from this approach. However, the test used by the courts below fell well short of the proper constitutional standard for determining the type of questions a witness is obliged to answer.

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[23] 198 F. 2d 438 (1952), cited with approval in *Emspak* v. *United States*, 349 U. S. 190 (1954).

1. THE FINDINGS OF THE SUPERIOR COURT OF HARTFORD COUNTY:

The draft finding contained in the "Memorandum of Decision" of the trial court judge gives some indication that he had the *Hoffman* test in mind (R. 12). Yet, when asked by petitioner's attorney to incorporate this "Memorandum of Decision" into his findings (R. 16), the trial court judge declined to do so. Instead of showing anything approaching the solicitude for the defendant shown in the federal cases above, the trial judge made the following finding (R. 21):

> "16. The questions propounded to petitioner do not indicate a danger to the petitioner of criminal liability which is *real and appreciable* with reference to the ordinary operation of law in the ordinary course of things (Emphasis added)."

Rather than take into account petitioner's possible fear that "incrimination might be approached by obscure and unlikely lines of inquiry,"[24] the trial court judge ruled that petitioner had no "reasonable ground" to fear criminal prosecution (R. 21, Finding 18). He thus demonstrated a lack of awareness of the "setting" in which the questions were asked. For petitioner was not an ordinary citizen being interviewed in a Roper poll. Rather he was a convicted criminal called to testify precisely because of his past record. Hence he was especially justified in being apprehensive of further prosecution. For as Judge Magruder noted in *Maffie* v. *United States*, *supra* at 228-29, which involved questions asked during an investigation into the notorious Brinks robbery:

> "* * * the witness may have reason to believe that he himself is under suspicion and that it will be the purpose of the interrogator to worm out of him all the self-incriminating disclosures possible. In that case, the situation of the witness approaches that of an accused person at a criminal trial, who

[24] See note 23 *supra*; *Coffey* v. *United States*, 198 F. 2d 438, 440-441.

> may elect to keep silent altogether. The witness may be willing to answer certain formal preliminary inquiries, as to matters generally known, such as his name, residence, age, et cetera. But he may have a justified apprehension of danger in answering further. He may not have the acuteness to see what an innocuous looking question, put by a resourceful cross-examiner, is leading up to. *Yet he might not be unreasonable in believing that the question was asked for a purpose, and that the purpose was to lead him into a booby trap in which he would make some disclosures useful to the prosecution in weaving a case against him.* (Emphasis added)."

We urge that standards similar to those applied to *Maffie* by Judge Magruder be applied by the Court in this case. It is clear that such standards were not applied by either of the courts below.

2. The Test Used by the Supreme Court of Errors of Connecticut.

In upholding the trial court, the Supreme Court of Errors of Connecticut used the test set forth in *McCarthy* v. *Clancy*, 110 Conn. 482 (1930) (R. 29-30). The *McCarthy* case rested in turn on the rule set forth in 1861 in England by Lord Chief Justice Cockburn in *Regina* v. *Boyes*, 1 *B. & S.* 311, 350, that the danger to the witness must be "real and appreciable" before he can refuse to answer. But it seems clear that the *Regina* v. *Boyes* test reflects notions of "due process" of a century ago, rather than today's more civilized standard of the *Hoffman*, *Singleton*, *Coffey* and *Maffie* cases, *supra*.

That the old *Regina* v. *Boyes* test is not this Court's test of whether questions tend to be incriminatory is evident from *Emspak* v. *United States*, 349 U. S. 190 (1955). This Court, in ruling that Emspak's assertion of the privilege was within his constitutional rights, relied on the *Hoffman*, *Greenberg*, *Singleton* and *Coffey* standard. In contrast, the old test of *Regina* v. *Boyes* was relied on in Mr. Justice

Harlan's dissent. It must finally be noted that Mr. Justice Harlan dissented in the *Mapp* case, and in *Ker* was the lone member of the Court to disagree with the standard of what would be an "unreasonable" search and seizure which elaborated on *Mapp*.

Thus, by using wrong constitutional standards, particularly the ancient test of *Regina* v. *Boyes*, both the trial court and the Supreme Court of Errors of Connecticut failed to consider properly whether the questions asked would tend to incriminate Petitioner.

IV

Petitioner's refusal to answer was justified: answers to the questions asked or an explanation why these questions could not be answered might have tended to incriminate him.

A. The Supreme Court of Errors of Connecticut mistakenly assumed that petitioner was immune from prosecution.

The Supreme Court of Errors of Connecticut ruled that petitioner's answers to those questions asked by the State's attorney which were directed to the time of his prior conviction could not tend to incriminate him because double jeopardy and the one year statute of limitations barred prosecution for either a misdemeanor or conspiracy to commit a misdemeanor (R. 33). We submit, however, that the Connecticut court was naive in assuming (R. 32) that simply because the questions asked related to the time of his earlier arrest, answers to those questions could not possibly furnish information which might lead to prosecution for a misdemeanor committed subsequent to that date. The same holds true with that court's ruling on a conspiracy to commit a misdemeanor—particularly if the conspiracy were a continuing one. The Record shows that petitioner was arrested as part of a gambling investigation (R. 27)

and the investigators wanted to find out about other gambling operations. Therefore, petitioner was asked who selected his bondsman, who paid his fine, etc., as well as a question not directed to the time of his original offense: "Do you know John Bergote?" (R. 10, 20). The Connecticut court was not justified in assuming that if these questions were answered, and all the people whose names were disclosed were rounded up, there could be no possibility of prosecution for a misdemeanor, or a conspiracy (continuing or not) to commit one. Moreover, the court did not consider the facts that the statute of limitations for Connecticut felonies (or their accompanying conspiracies) runs up to five years. Conn. General Statutes § 54-193.

B. If petitioner or his counsel had spelled out the reasons for the refusal to answer, such elaboration would have negated the reason for the existence of the Fifth Amendment privilege.

Neither petitioner nor his counsel elaborated on the reasons for petitioner's refusal to answer certain questions, other than to say that the questions might incriminate him.[25] They made a judgment that to spell out such reasons would be overly dangerous and amount, effectively, to a waiver of his privilege. Petitioner felt so convinced of this danger that he chose to go to jail, even though by making the requested disclosures he held the key to his cell in his own pocket. A similar lack of explanation was present in *Singleton* v. *United States*, 343 U. S. 944 (1952), a contempt conviction which this Court summarily reversed. In addition, petitioner's fear about answering, or explaining why he could not answer, were increased because, being a witness at a special inquiry, he did not have the additional

[25] Indeed, it appears from the Record (R. 31-2) that, with respect to the questions relating to the time of petitioner's earlier conviction, the lower court specifically refused to consider whether on their face and without requiring explanation, the questions were incriminatory, as required by the *Hoffman* test, *supra*.

safeguards which accrue to a criminal defendant on trial, such as the right of cross-examination. An analysis of the cases in which sentences for contempt on the basis of the claim of a Fifth Amendment privilege have been reversed by this Court and the Federal Circuit Courts, shows that most of them arose out of investigations similar to the one here, such as a grand jury investigation, or investigations by Congressional committees. Indeed, with respect to the Hartford investigation, there is no indication on the record that petitioner had the protection of secrecy which inheres in grand jury investigations. Under Sec. 54-47 of the Connecticut General Statutes such investigations can be public. Dean Griswold, in "The Fifth Amendment Today," *supra*, has warned us that the courts must be especially jealous to guard civil liberties in investigations.

V

Petitioner was justified in refusing to answer the questions asked because of a legitimate fear, under the doctrine of waiver, that if he answered some of such questions he might forfeit his constitutional privilege entirely.

In 1951, this Court decided *Rogers* v. *United States*, 340 U. S. 367 (1951). Mrs. Rogers had been Treasurer of the Denver Communist Party and testified that she had certain records in her possession and had turned them over to another person. After these few disclosures, she refused to answer any more questions, claiming her privilege under the Fifth Amendment. The Supreme Court held that since she had answered some questions freely, she was deemed to have waived her privilege against self-incrimination and must answer all further questions on pain of contempt. As the dissent characterized it:

> "* * * at some uncertain point in petitioner's testimony, regardless of her intention, admission of asso-

> ciations with the Communist Party automatically effected a 'waiver' of her constitutional protection as to all questions." 340 U. S. at 377.

The doctrine of waiver has been much criticized,[26] not the least because of its uncertainty. It puts the witness who is being asked questions, in a dilemma. Consider petitioner's situation. If he refused to answer many questions, he might be held in contempt of court, as proved to be the case here. Yet if he had answered some questions asked him, he might find that, by his prior answers, he had waived all right not to incriminate himself. Since the point at which the doctrine of waiver comes into play is most uncertain, petitioner was hard put to know when to answer or when not to answer. Due to a lack of clear judicial guidelines, his attorney was equally hard pressed to advise him.

Perhaps the rule of the *Rogers* case should be overturned. However, despite its vagueness, the decision still stands. While it remains on the books, it is almost impossible for a witness to escape the Scylla and Charybdis of contempt and waiver. The existence, then, of the tricky waiver doctrine must be weighed in the balance as an important factor when this Court makes a determination whether petitioner was "reasonable" in refusing to answer. Frightened by the inquisitorial nature of the investigation, deprived of the opportunity for cross-examination, conscious of his past criminal record, mindful that his former bookmaking associates and others who if called to testify might implicate him in a conspiracy or felony, and, finally, fearful of the trap of the doctrine of waiver, petitioner's refusal to answer was reasonable.

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[26] See Griswold, The Fifth Amendment Today, pp. 22-23.

CONCLUSION

For the reasons stated above, petitioner's conviction must be reversed.

Respectfully submitted,

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